Filed 8/17/12 In re C.B. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re C.B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. C.B., Defendant and Appellant.	A131536 (Contra Costa County Super. Ct. No. J0901505)

Defendant and appellant C.B. pleaded no contest to committing assault with a firearm and an enhancement of personal use of a firearm. He appeals from the dispositional order, claiming the juvenile court (a) erred in denying his motion to suppress evidence seized during a probation search of his residence and (b) abused its discretion by committing him to the Division of Juvenile Facilities (DJF). We conclude the juvenile court neither erred nor abused its discretion, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On May 5, 2010,[2] at 7:01 a.m., Detective Nathaniel McCormack and 10 other employees of the Contra Costa Sheriff's Department conducted a probation search of

[1] The factual background is based on testimony at the hearing on the motion to suppress and the probation report.

[2] Unless otherwise indicated, all referenced dates are in 2010.

defendant at an address on Madison Avenue in Bay Point (the Madison Avenue residence). Defendant was a suspect in a shooting that occurred on April 12.

Prior to the search, Detective McCormack learned defendant was a ward of the juvenile court and on probation after a sustained allegation of unlawful possession of a firearm by a minor in April 2009 and a sustained allegation of possession of rock cocaine in September 2009. McCormack contacted defendant's probation officer, who indicated the terms of his probation allowed search of his person and residence. The probation officer also told McCormack defendant lived at the Madison Avenue residence with his mother, Rachel B. McCormack learned from a postal inspector there was "a change of address on file directing mail from a previous address to . . . Madison Avenue in the name of Rachel B[.]," effective January 29. McCormack then drove by the Madison Avenue residence and ran registration checks on the two vehicles at the residence. Both vehicles were registered in Rachel B.'s name, one at the Madison Avenue residence.

When sheriff's department personnel arrived on May 5, they were wearing tactical vests with the word "Sheriff" on the front and back, and ballistic helmets. Detective McCormack pounded on the locked metal security screen covering the front door of the home and announced " 'Sheriff's office, probation search, demand entry.' " He repeated the knock-notice procedure two more times. Approximately "15, 20 seconds" elapsed from the first knock until the third knock.

After the third knock-notice, another officer used a "pry tool" to open the screen in "a couple seconds." After the screen door was opened, McCormack loudly "announced a couple more times 'Sheriff's office, probation search, demand entry.' " Sergeant Beard then began to hit the front door with a ram, "a metal object about three feet long . . . used to force open doors." While Beard was hitting the door, McCormack heard voices from inside the house, but could not understand what they were saying. Beard hit the door numerous times before it split open, taking "five, 10 seconds."

McCormack and another officer entered the house first. McCormack saw defendant "standing there," with a Walther P22 handgun "sitting a few inches away from his right hand, [and] the hammer was cocked." He handcuffed defendant and "grabbed

the gun and handed it off to another detective." After entering the house, McCormack kicked a .22 shell. He looked at it and determined "it was just the shell, there was no bullet attached." McCormack "asked for the gun and I smelled it, and . . . could smell an odor of burnt powder." Detectives found a bullet hole in the wooden front door of the house.

McCormack asked defendant if he shot at the detectives. C.B. said "he shot at the door because he did not know what was going on" and he thought someone was breaking in.

Rachel B. was standing in "very close proximity to [C.B.]," and there were two other minor children in the house. She said the handgun was hers. Detectives searched defendant's bedroom and found a loaded Norinco Mak 90 assault weapon under the mattress. They also found handwritten notes "about wanting to shoot people."

The following day, May 6, the Contra Costa District Attorney filed a supplemental petition alleging defendant, then 16 years of age, assaulted three police officers with a firearm. (Pen. Code, § 245, subd. (d)(1).)[3] The petition included personal use of a firearm enhancement allegations as to each of the assault counts (former § 12022.5, subd. (a)(1)) and also alleged one count of possession of an assault weapon (former § 12280, subd. (b)) and one count of possession of a firearm by a minor (former § 12101, subd. (a)).

After the juvenile court denied a motion to suppress evidence obtained during the probation search, defendant entered into a negotiated disposition. The prosecutor amended the supplemental petition to add a count of assault with a firearm with a personal use enhancement under former section 12022.5, subdivision (a)(1), and moved to dismiss the remaining counts. Defendant then entered a no contest plea to the amended allegations.

At the disposition hearing, the court ordered defendant committed to the DJF, with a maximum term of confinement of eight years. The court imposed the midterm of seven

[3] All further statutory references are to the Penal Code, unless otherwise indicated.

years for the assault with a firearm count, four months for his prior sustained petition for possession of rock cocaine (Health & Saf. Code, § 11350) and eight months for his prior sustained petition for unlawful possession of a firearm (former § 12101(a)(1)) and awarded credit for time served of 316 days.

DISCUSSION

Motion to Suppress

In reviewing a ruling on a motion to suppress, we "defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search and seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Search Condition

"A residence search conducted without a warrant is presumed unreasonable unless it comes within an exception to the warrant requirement. [Citation.] One such exception is the consent to search. [Citations.] In California, probationers consent in advance, as a condition of their probation, to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.] Warrantless searches of probationers are justified because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. [Citations.] 'By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers. [Citation.]' " (*People v. Medina* (2007) 158 Cal.App.4th 1571, 1575-1576 (*Medina*), quoting *People v. Robles* (2000) 23 Cal.4th 789, 795.)

Defendant asserts the probation search was invalid for lack of any "reasonable suspicion" of criminal activity. However, there is no "reasonable suspicion" requirement for a probation search. A "suspicionless search pursuant to a probation search condition is not prohibited by the Fourth Amendment." (*Medina, supra,* 158 Cal.App.4th at

p. 1580.)[4] A " 'search condition of probation that permits a search without a warrant also permits a search without "reasonable cause." ' " (*In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 (*Anthony S.*), quoting *People v. Bravo* (1987) 43 Cal.3d 600, 611 (*Bravo*).) An "officer acting in reliance on a search condition may act reasonably, even in the absence of any particularized suspicion of criminal activity, and such a search does not violate the suspect's reasonable expectation of privacy."[5] (*In re Jaime P.* (2006) 40 Cal.4th 128, 134.) An officer must, however, have advance knowledge the individual is subject to a probation search prior to conducting the search. (*Id.* at p. 133.)

Defendant does not dispute he was on probation and subject to a search condition on May 5. Nor does he dispute Detective McCormack knew prior to the search that the terms of his probation included a search condition. As we have discussed, once McCormack was aware defendant was on probation and subject to search, the officer was not required to have reasonable suspicion that he was engaged in criminal activity.

Defendant's Residency

"[A]n officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only a 'reasonable belief,' falling short of probable cause[,] to believe[] the suspect lives there and is present at the time." (*People v. Downey* (2011) 198 Cal.App.4th 652, 662.)

Defendant asserts Detective McCormack "did not have probable cause" to believe he lived at the Madison Avenue residence and was present at the time of the search, and

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[4] While the United States Supreme Court has concluded "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee" (*Samson v. California* (2006) 547 U.S. 843, 857), it has not yet addressed the issue of whether a suspicionless probation search violates the Fourth Amendment. (*Medina, supra,* 158 Cal.App.4th at p. 1580.) In the absence of United States Supreme Court authority, we are bound to follow California law under which "a suspicionless search pursuant to a probation search condition is not prohibited by the Fourth Amendment." (*Ibid.*)

[5] Indeed, it appears appellant, and the Attorney General in response, have conflated the question of whether the probation search was conducted in a constitutionally reasonable manner, with the issue of whether a probation search requires reasonable suspicion of criminal activity.

urges us to follow the Ninth Circuit's view that "reasonable belief" is the same as "probable cause." (See *United States v. Howard* (9th Cir. 2006) 447 F.3d 1257, 1262; *United States v. Gorman* (9th Cir. 2002) 314 F.3d 1105, 1110-1111.) However, the "Ninth Circuit stands alone among the federal circuits in . . . requiring probable cause" that a suspect lives at the residence in question. (*People v. Downey, supra,* 198 Cal.App.4th at p. 661.) Ninth Circuit cases are not binding on California courts, and we decline to follow the circuit's novel interpretation. (See *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 763 & fn. 8.) Detective McCormack needed only a "reasonable belief" defendant resided and was present at the Madison Avenue residence.

Defendant also asserts "it was not objectively reasonable" for Detective McCormack to believe he lived and was present at the Madison Avenue residence. However, prior to the search, McCormack conducted an investigation into defendant's residence. He contacted defendant's probation officer, who told him defendant was on probation with a search condition and lived with his mother, Rachel B., at the Madison Avenue address. The probation officer had seen him "approximately a month prior." McCormack then drove by the residence, observed the vehicles parked in front, and ran registration checks on both. Both were registered to Rachel B., one at the Madison Avenue address. In addition, McCormack contacted a postal inspector and learned there was "a change of address on file directing mail from a previous address to . . . Madison Avenue in the name of Rachel B[.],"effective January 29. The search was conducted on a school day at 7:00 a.m., and Detective McCormack believed, based on defendant's age, that he would be present at that hour in the morning. The results of his investigation provided Detective McCormack with ample "reasonable belief" defendant lived and would be present at the Madison Avenue address.

Defendant contends the juvenile court erred in taking judicial notice of his address on the May 6 supplemental petition. Evidence Code section 452 provides judicial notice may be taken of "[r]ecords of . . . any court of this state . . . ." (Evid. Code, § 452, subd. (d)(1).) Although " 'the *existence* of statements contained in . . . [a] court record can be judicially noticed, their *truth* is not subject to judicial notice.' " (*Big Valley Band of*

Pomo Indians v. Superior Court (2005) 133 Cal.App.4th 1185, 1192.) Thus, the court could properly take judicial notice of the supplemental petition and the existence of the Madison Avenue address on that petition, but not of the fact the Madison Avenue address *was* defendant's address. As previously discussed, however, there was other evidence defendant resided at the Madison Avenue address, and that evidence was sufficient to provide Officer McCormack with a "reasonable belief" defendant resided there.

Scope and Manner of Search

A probation search must be conducted in a constitutionally reasonable manner. (*Anthony S. supra*, 4 Cal.App.4th at p. 1004, citing *Bravo, supra,* 43 Cal.3d. at p. 608.) The search may be unreasonable "where the search exceeds the scope of the consent [citation], is conducted in a[constitutionally] unreasonable manner [citation], is undertaken for harassment [citation] or is '. . . for arbitrary or capricious reasons.' " (*Anthony S.*, at p. 1004.) "Whether a search is arbitrary, capricious, or harassing turns on its purpose." (*People v. Smith* (2009) 172 Cal.App.4th 1354, 1362.) A probation search is arbitrary[6] "when the officer's motivation is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes, as when it is driven by personal animosity toward the parolee." (*Ibid*., citing *Anthony S., supra*, 4 Cal.App.4th at p. 1004.)

Defendant asserts the "scope and manner" of the probation search was oppressive, arbitrary and constitutionally unreasonable. He complains about the "early morning" hour of the search, that there were "eleven armed officers dressed in riot gear," and there was a short amount of time between the "knock-notice" and forcible entry.

Detective McCormack testified that "after 7:00 a.m. . . . is the normal time for search warrants."[7] He also wanted to conduct the probation search at a sufficiently early hour that it would be over before the school directly behind the Madison Avenue house

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[6] "[W]e treat 'arbitrary' and 'capricious' as synonymous." (*Anthony S., supra*, 4 Cal.App.4th at p. 1004, fn. 3.)

[7] McCormack apparently was referring to Penal Code section 1533, under which warrants are presumptively served between 7:00 a.m. and 10:00 p.m., unless good cause is shown for service outside that temporal window. (Pen. Code, § 1533.)

started. McCormack also believed, based on defendant's age, he would be present in the residence at that hour on a Wednesday morning. Defendant has pointed to nothing in the record and no legal authority suggesting the time of the probation search rendered it constitutionally unreasonable.

Detective McCormack further testified he knew prior to conducting the probation search that defendant had been convicted of a firearms offense and was a suspect in a shooting. Defendant has failed to cite a single case holding the mere number of officers or their protective clothing renders a probation search constitutionally unreasonable, and that certainly is not the case given the facts and circumstances here.

Defendant acknowledges a violation of the knock-notice rule does not require suppression of the evidence found in the search,[8] but asserts it is "part of the reasonableness inquiry under the Fourth Amendment" under *Wilson v. Arkansas* (1995) 514 U.S. 927, 929-930. The "knock-notice rule applies to probation searches." (*People v. Murphy* (2005) 37 Cal.4th 490, 496.) "[C]ourts have consistently held that initial entries into a home by law enforcement officers to conduct a probation or parole search . . . must comply with the knock-notice requirements." (*People v. Mays* (1998) 67 Cal.App.4th 969, 973, fn. 4.) "[B]efore entering a house to make an arrest or perform a search, officers must first identify themselves, explain their purpose, and demand admittance." (*People v. Murphy, supra,* at p. 495.) "[L]aw enforcement officers must . . . provide residents an opportunity to open the door . . . ." (*Hudson, supra,* 547 U.S. at p. 589.) As *Hudson* explained, "[w]hen the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our 'reasonable wait time' standard [citation] is necessarily vague."[9] (*Id.* at p. 590.)

Defendant relies on *People v. Urziceanu* (2005) 132 Cal.App.4th 747, claiming the court in that case reversed the denial of a motion to suppress on facts analogous to

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[8] *Hudson v. Michigan* (2006) 547 U.S. 586, 602 (*Hudson*).

[9] One court has observed that "[t]wenty seconds is not a flash of time allowing for no response at all." (*People v. Elder* (1976) 63 Cal.App.3d 731, 739, overruled on another ground in *People v. Chapman* (1984) 36 Cal.3d 98, 109-113.)

those here. In *Urziceanu*, police arrived at the defendant's house to conduct a probation search. The officer testified he knocked and announced his purpose, then waited 30 seconds before breaking down the door. (*Id*. at p. 788.) The defense presented evidence there was only an eight to 10-second gap between the knock-notice and breaking down the door. (*Ibid*.) "Based on this factual uncertainty and the trial court's failure to make the simple factual findings as to what testimony it believed, we cannot uphold the trial court's conclusion of substantial compliance." (*Id*. at p. 792.)

Here, in contrast, the juvenile court made express findings as to the sequence of events and timing. Specifically, the court found no conflict between Rachel B.'s testimony that she did not hear the knock-notice and Detective McCormack's testimony that he gave it. The court stated: "On the credibility issue, I don't have to find either that [Rachel B.] was truthful when she said she didn't hear it or not. I think that there's a clear explanation that does not require me to conclude she was lying, and that's simply to accept the statement that she gave the police at the time, which was that she was sleeping and didn't hear it. If I credit that explanation, I certainly credit the testimony of Sergeant McCormack with respect to the knock notice."

Detective McCormack testified he pounded on the locked metal security screen covering the front door of the home and announced " 'Sheriff's office, probation search, demand entry' " three times. Approximately "15, 20 seconds" elapsed from the first knock until the third knock. After the third knock-notice, another officer used a "pry tool" to open the screen in "a couple seconds." After the screen door was opened, McCormack loudly "announced a couple more times 'Sheriff's office, probation search, demand entry.' " Sergeant Beard of the sheriff's department then began to hit the front door with a ram, while McCormack heard voices from inside the house, but could not understand what they were saying. On these facts, there was no violation of the knock-notice rule.

In sum, we conclude the juvenile court properly denied defendant's motion to suppress.

Commitment to DJF

Defendant maintains the juvenile court abused its discretion in committing him to the DJF. He claims the court "focused solely on the seriousness and gravity of the instant offense thereby failing to conduct an individualized disposition focused on [C.B.'s] rehabilitative needs," and failed to consider whether he had special educational needs. He also urges the "ongoing . . . challenges the state [DJF] system has with adequacy of care and the safety of its incarcerated youth" demonstrate "a [DJF] commitment will not successfully rehabilitate [him]."[10]

"When determining the appropriate disposition in a delinquency proceeding, the juvenile courts are required to consider '(1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history.' (Welf. & Inst. Code, § 725.5; see also *In re Gary B.* (1998) 61 Cal.App.4th 844, 848-849 . . . .) Additionally, 'there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJF] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives.' [Citation.] 'A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion. [Citation.]' [Citation.]" (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 484-485.)

"Although the [DJF] is normally a placement of last resort, there is no absolute rule that a [DJF] commitment cannot be ordered unless less restrictive placements have been attempted. [Citations.] A [DJF] commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less

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[10] Appellant filed a request for judicial notice of certain documents relating to this contention, including a newspaper article. Only one meets the statutory requirements for permissive judicial notice, an August 4, 2011, endorsed filed copy of an order of the Alameda County Superior Court granting a motion to enforce the DJF's duties under a 2004 consent decree. (Evid. Code, § 452, subds. (a), (d).) We deny appellant's request for judicial notice as to all but Exhibit 4. That order demonstrates the "challenges" at the DJF are being addressed by the judicial system.

restrictive alternatives would be ineffective or inappropriate." (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

At the contested dispositional hearing, the juvenile court considered the probation report and heard the testimony of defendant's probation officer, as well as considered statements by defendant and two of his aunts. The court also considered defendant's school transcript, juvenile hall adjustment record, and letters to the court from both defendant and one of his aunts.

The probation report indicated defendant had a long history of contacts with the juvenile justice system beginning in 2003. At that time, he was cited for petty theft, which was "closed at intake by Probation." In October 2004, he was arrested after being involved in a "physical altercation" at a middle school. That matter was also "closed [at] intake by Probation" on June 2, 2005. On June 8, 2005, defendant punched a victim in the face, and was cited for battery on school grounds. On July 29, 2005 he was arrested for petty theft and battery after he stole items from a grocery store and punched the assistant manager in his right ear. The petty theft allegation was sustained and the battery charge was dismissed, he was continued as a ward of the court and placed on a home supervision program with other probation conditions.

In December 2006, defendant was arrested at a middle school for selling marijuana. The matter was closed without charges being filed. About a week later, a notice of probation violation was filed alleging defendant failed to complete nine work details. The probation violation was sustained, and he was ordered to serve 30 days in the home supervision program.

In November 2007, defendant again violated the terms of his probation by being suspended from school. He was ordered detained in Juvenile Hall for three days, followed by 60 days in the home supervision program. In December 2007, a "Change of Circumstances" petition under Welfare and Institutions Code section 778 was filed after defendant's mother bit him, pulled a knife on him and hit him with a trophy. The court ordered that he live with his grandmother in Oakland.

In April 2008, defendant again violated the terms of his probation by testing positive for marijuana. In May 2008, he tested positive for opiates and the probation violation was sustained. He was again placed on the home supervision program, this time for 30 days.

Defendant was arrested in March 2009 and again adjudged a ward of the court following his admission of possession of a concealable firearm by a minor. (Former Pen. Code, § 12101, subd. (a)(4).) He made the following statement to the probation officer: "My cousin got into a fight with somebody the day before . . . [who] threatened to kill him. I felt like it was my job to protect him so I went out and got a gun from an older dude in the neighborhood. We [were] standing on the corner and they drove past us and started shooting at us. . . . I started shooting back. . . They shot my cousin in the leg. [¶] I had to sell the drugs to pay the gun off because I couldn't get the gun for free. . . ." Defendant was again placed on probation.

Defendant's probation officer testified at the contested disposition hearing. She explained that, despite his record, he had never had a "ranch commitment" or "been to placement." She testified defendant was found "not suitable" for placement options other than DJF due to the nature and seriousness of his offense, including the use of a gun. She contacted the Youth Offender Treatment Program and the county Boys Ranch program, but neither would accept him. She also testified that while in juvenile hall awaiting disposition, he "attack[ed] another resident with a closed fist."

A May 7, 2009, dispositional report from Alameda County indicated defendant had an IEP[11] at his high school. The current probation report indicated he "has never been a special education student." His probation officer testified she contacted that school, and was told their records did not indicate he had an IEP. His most recent grade

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11 An "IEP" is an individualized education plan, " 'a comprehensive statement of a disabled child's educational needs and the specifically designed instruction and related services that will meet those needs. [Citation.] . . .' '[A]n IEP is reviewed at least annually and revised as necessary.' " (*In re R.W.* (2009) 172 Cal.App.4th 1268, 1270, quoting *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1067.)

point average at the high school at juvenile hall was 2.57, and he passed the high school exit exam (CAHSEE).

The juvenile court stated: "I think it is unfortunate that we did not make more intensive interventions at an earlier time in C[.B.]'s life. I suspect that might have been good if the first time he used a gun he spent some time at the Boys Ranch. Perhaps that would have prevented this occurrence. Who knows. [¶] . . . [¶] I find that he is a significant danger to the community. I find that he is a significant danger to himself. The Boys Ranch is an open program, would be utterly inappropriate. YOTP [is] closer, but I don't think it has a sufficient period of time factually available to work with him at the level that he needs to be worked at. [¶] So I will find that there are no local options appropriate to the rehabilitation of the minor and protection of the community and I will order him committed to the Department of Juvenile Justice." The court further found defendant "does not have exceptional needs [and] . . . can benefit from the educational discipline and counseling at the Department . . . of Juvenile Justice."

The court considered defendant's rehabilitative needs given his extensive history of violent behavior. It also considered whether he had special educational needs, and its finding that he did not is amply supported in the record. The record demonstrates a probable benefit to defendant from the DJF commitment, and an absence of any other less restrictive alternatives. (See *In re M.S.*, *supra*, 174 Cal.App.4th at p. 1250.) On these facts, the juvenile court did not abuse its discretion in committing him to the DJF.

DISPOSITION

The dispositional order is affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.